nity in a series of Resolutions going back to the Pool Commission Report of the 1930s, the General Assembly's Partition Resolution of 1947, and Resolutions 242 and 338. The source of that turmoil, as the events of the last week make clear, is the passionate resistance of certain Arab states and groups to the idea of obeying Resolutions 242 and 338 and making peace with Israel—a step the Resolutions make preconditions for any Israeli withdrawals at all.

The MacBride Commission Report never confronts the second deep conflict in its argument: If a state of war between Israel and the Arab states continues to exist, although the Security Council has said the opposite, then how can the Commission condemn the Israeli campaign in Lebanon as an aggression? If the Arab states insist they are at war with Israel and can attack Israel at times and places of their own choosing, on what ground can they object if Israel does likewise?

Remarks by Francis A. Boyle*

The Illegality of the Invasion

In the modern world of international relations, the only legitimate justifications and procedures for the perpetration of violence and coercion by one state against another are those set forth in the U.N. Charter. The Charter alone contains those rules which have been consented to by the virtual unanimity of the international community that has voluntarily joined the United Nations Organization. These include and are limited to the right of individual and collective self-defense in the event of an "armed attack" as prescribed by article 51; chapter 7 "enforcement action" by the U.N. Security Council; chapter 8 "enforcement action" by the appropriate regional organizations acting with the authorization of the Security Council, as required by article 53; and the so-called "peacekeeping operations" organized under the jurisdiction of the Security Council pursuant to chapter 6, or under the auspices of the U.N. General Assembly in accordance with the Uniting for Peace Resolution (1950), or by the relevant regional organizations acting in conformity with their proper constitutional procedures and subject to the overall supervision of the U.N. Security Council, as specified in chapter 8 and articles 24 and 25.

The most recent invasion of Lebanon by the Government of Israel constitutes a clear-cut violation of U.N. Charter articles 2(3) and 33, mandating the peaceful settlement of international disputes, as well as the article 2(4) prohibition on the threat or use of force in international relations against the territorial integrity or political independence of any state. Despite the assertions of Israeli Prime Minister Begin before the General Assembly to the contrary, the invasion cannot be excused as a legitimate exercise of the right of self-defense recognized by article 51 of the Charter and accepted principles of customary international law concerning the use of force.

The PLO is likewise bound by article 2(3), 2(4) and 33 obligations, and the Lebanese Government must not allow its territory to be used in a manner violative of international law. Nevertheless, the PLO cannot be held legally responsible for every act of violence perpetrated against Israel that occurs anywhere in the world. In such matters involving allegations based on circumstantial evidence, the burden of proof is upon Israel to produce sufficient facts from which inferences that the PLO has sanctioned specific military operations can permissibly be drawn, "provided that they leave *no room* for reasonable doubt."[1] Israel has completely failed to discharge this weighty

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[1]Judgment in the Corfu Channel Case, (U.K. v. Albania), [1949] I.C.J. 4, at 18 (emphasis in original).

burden of proof, let alone the far less rigorous standard of "clear and convincing" evidence.

Indeed, the evidentiary record clearly establishes that during the year preceding the invasion, the PLO had in good faith adhered to the terms of the Lebanese-Israeli cease-fire successfully negotiated in the summer of 1981 by President Reagan's special envoy for the crisis, Philip Habib. Consequently, the PLO did not launch any "armed attack" from Lebanon upon Israel, as required by article 51, before the latter could resort to the use of force to defend itself by invading that country. To the contrary, it was Israel that perpetrated an "armed attack" upon Lebanon and the PLO in explicit violation of its U.N. Charter obligations, thus triggering their respective rights of individual self-defense under international law to resist this unlawful invasion.

Nor can the Begin Government appropriately use the massive stockpiling of weapons by the PLO in Lebanon as a legitimate justification for the invasion of that country. Despite assertions of the Israeli Government to the contrary, the regressive doctrine of anticipatory or preemptive self-defense has not survived under the regime of the U.N. Charter. Yet even assuming for the purpose of argument that the contemporary international legal order still recognizes an alleged right of anticipatory self-defense, the Israeli invasion of Lebanon fails to meet that test as well. As definitively stated by U.S. Secretary of State Daniel Webster in the famous case of *The Caroline*, the "necessity of that self-defense [must be] instant, overwhelming, and leaving no choice of means, and no moment for deliberation."[2] In a front-page interview published by the *Wall Street Journal* last July, Prime Minister Begin candidly admitted that the recent invasion of Lebanon was not necessary to ensure the existence of the state of Israel.[3] Begin emphatically repeated this assertion in an August 8 speech at the National Defense College, and specifically stated that the invasion of Lebanon "does not really belong to the category of wars of no alternative."[4] By his own words Begin voluntarily conceded those very facts which definitively repudiate the claim that this invasion was a legitimate act of self-defense in accordance with any generally recognized test of public international law, all of which depend upon fulfilling the basic requirement of "necessity."

Furthermore, Israel cannot invoke the antiquated doctrines of intervention, protection and self-help to justify its invasion of Lebanon. These obsolete principles of customary international law have been unanimously repudiated by a decision of the International Court of Justice in the *Corfu Channel Case* (1949) as being totally incompatible with the proper conduct of international relations in the post-World War II era.[5] These retrogressive doctrines are relics of 19th-century "gunboat diplomacy" that were inflicted by the world's major imperial powers upon militarily inferior international actors and coveted colonial territories. They have now been universally discredited by the regime of the U.N. Charter.

In addition, three seminal U.N. General Assembly Resolutions have a decisive bearing on this issue: The Declaration on the Inadmissibility of Intervention, Res. 2131(XX) (1965); The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Res. 2625(XXV) (1970); and the Definition of Aggression, Res. 3314(XXIX) (1974). Considered together, these three Resolutions stand for the gen-

[2]J. MOORE, 2 A DIGEST OF INTERNATIONAL LAW 409, 412 (1906).
[3]Wall Street Journal, July 9, 1982, at 9, col. 4.
[4]N.Y. Times, Aug. 21, 1982, at 6, col. 6.
[5]Judgment in the Corfu Channel Case, (U.K. v. Albania), [1949] I.C.J. 4, at 34-35.

eral proposition that, in the emphatic opinion of the members of the U.N. General Assembly, nonconsensual military intervention by one state into the territorial domain of another state is prohibited for any reason whatsoever. The Israeli invasion of Lebanon is a "breach of the peace" and an "act of agression" within the meaning and purpose of U.N. Charter article 39 interpreted by reference to these Resolutions. Furthermore, it also qualifies as a "crime against peace" as defined by article 6(a) of the Nuremberg Charter.[6]

Finally, the Israeli invasion of Lebanon has violated the basic principle of customary international law dictating proportionality in the use of force. This requirement of "proportionality" applies to even a legitimate exercise of the right to self-defense under international law. The enormous scale of death, destruction, dislocations and suffering inflicted by the Israeli army in Lebanon is egregiously disproportionate to any harm that has been perpetrated upon Israel or to any serious threat to its legitimate national security interests posed by the presence of the PLO in Lebanon. For example, Eliahu Ben-Elissar, chairman of the Knesset's key Foreign Affairs and Defense Committee, brazenly stated in a *New York Times* interview that Israeli counterstrikes in Lebanon "won't be proportionate."[7] The tragic history of repeated violence between the PLO and Israel does not alter the admitted facts that this invasion does not fulfill the two fundamental conditions of "necessity" and "proportionality" required by international law before any government can justify the use of transnational force.

The Applicability of the Geneva Conventions

The four Geneva Conventions of 1949 apply in their entirety to the conduct of hostilities by Israel in Lebanon. Since the start of the invasion last June, the Israeli Government has imprisoned a sum total of approximately 9,000 people at the Ansar Prison in southern Lebanon, a figure which currently stands at about 5,200 prisoners. Soldiers of the PLO who have been captured by the Israeli army in Lebanon are entitled to full-scope protections as "prisoners of war" within the meaning of the Third Geneva Convention, pursuant to article 4(a)(2) thereof, extending such treatment to members of organized resistance movements, or to article 4(a)(3) protecting regular armed forces professing allegiance to an authority not recognized by a detaining power, or to article 4(a)(6) protecting inhabitants of a nonoccupied territory who form themselves into a *levée en masse* upon the approach of an invading army. And article 5 specifies that in the event any doubt arises as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in article 4, such persons shall enjoy the protection of the Third Convention until such time as their status has been determined by a competent tribunal. Finally, article 130 of the Third Convention states that the willful deprivation of a prisoner of war's right of fair and regular trial prescribed in the Convention is a "grave breach" requiring the imposition of "effective penal sanctions" upon the perpetrator in accordance with article 129. In any event, even if PLO soldiers are deprived of their prisoner of war status, they, together with captured officials of the PLO and other individuals affiliated with them, as well as all Lebanese and Palestinian civilians, are entitled to the full panoply of protections set forth in the Fourth Geneva Convention and the customary international law of belligerent occupation. Statements by the Israeli Government that captured PLO soldiers and officials will be treated as "ter-

[6]*See* London Agreement of August 8, 1945, 59 Stat. 1544, E.A.S. No. 472.
[7]N.Y. Times, July 30, 1982, at 3, col. 5.

rorists" and thus presumably deprived of their protected status under the Geneva Conventions would, to the extent acted upon, constitute a grave violation of the humanitarian laws of armed conflict that have been universally accepted by all civilized states.

As a party to the four Geneva Conventions of 1949, the U.S. Government has an absolute obligation under (common) article 1 to respect and to ensure respect for their observance in all circumstances by other contracting powers such as Israel. This obligation becomes irresistibly compelling in a situation where Israel has been enabled to invade Lebanon by means of weapons, munitions and supplies provided primarily by the U.S. Government at concessionary rates. Unfortunately, there are several indications from the public record that the Reagan Administration willingly consented in advance to Israel's flagrantly illegal invasion of Lebanon shortly after Israel had completed its withdrawal from the Sinai on April 25, 1982 pursuant to the terms of its 1979 peace treaty with Egypt.[8]

Haig's "Strategic Consensus"

At the outset of the Reagan Administration, Secretary of State Alexander Haig and his mentor, Henry Kissinger, devoted a good deal of time to publicly lamenting the dire need for a "geopolitical" approach to American foreign policy decisionmaking, one premised on a "grand theory" or "strategic design" of international relations. Their conceptual framework towards international relations consisted essentially of nothing more sophisticated than a somewhat refined and superficially rationalized theory of Machiavellian power politics. Consequently, Haig quite myopically viewed the myriad of problems in the Middle East and Persian Gulf primarily within the context of a supposed struggle for control over the entire world between the United States and the Soviet Union. Haig erroneously concluded that this global confrontation required the United States to forge a "strategic consensus" between itself and Israel, Egypt, Jordan and Saudi Arabia in order to resist anticipated Soviet aggression in the region.

One apparent corollary to Haig's thesis was that the United States must more fully support the Begin Government even during the pursuit of its patently illegal policies in Lebanon and in the territories occupied as a result of the 1967 war because of Israel's overwhelming military superiority (courtesy of the United States) over any Arab state or combination thereof absent Egypt, which had been effectively neutralized by the 1979 peace treaty. Haig's vision of founding a U.S.-centered "strategic consensus" in the Middle East was simply a reincarnated version of Kissinger's "Nixon Doctrine," whereby regional surrogates were intended to assist the United States in policing its spheres of influence throughout the world by virtue of massive American military assistance. Israel would become America's new "policeman" for stability in the Middle East, filling the position recently vacated by the deposed Shah of Iran, whom the Nixon/Kissinger Administration had unsuccessfully deputized to serve as America's "policeman" for Southwest Asia.

Whereas the Shah fell because of internal domestic conditions that were only exacerbated by the large-scale U.S. military presence in Iran, Haig's scheme was tragically flawed from the very moment of its conception. Haig totally disregarded the fundamental realities of Middle Eastern international politics, where traditionally all regional actors have been far more exclusively concerned about relationships with their

[8]*See* Schiff, *Green Light, Lebanon*, FOREIGN POL'Y, Spring, 1983, at 73; ECONOMIST, June 12, 1982, at 24; THE MIDDLE EAST July, 1982, at 6; Washington Post, Aug. 14, 1982, at B7; Washington Post, Aug. 21, 1982, at 23; Philadelphia Inquirer, Feb. 4, 1983, at 6.

immediate neighbors than about some evanescent threat of Soviet aggression. Nevertheless, the Begin Government shrewdly manipulated Haig's delusions in order to generate American support for Israel's plan to invade Lebanon for the purpose of destroying the PLO and, as a result of the process, further consolidating its military occupation on the West Bank. The Israeli invasion of Lebanon is probably intended to be a prelude to *de facto* annexation of "Judea and Samaria" during the remainder of Begin's term in office.

The Nuremberg Principles

Article 6(a) of the 1945 Charter of the International Military Tribunal subsequently established at Nuremberg to prosecute and punish Nazi war criminals defines the term "crimes against peace" to mean "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." Nuremberg Charter article 6(b) defines the term "war crimes" to include "murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." Article 6(c) of the Nuremberg Charter defines the term "crimes against humanity" to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population." Article 6 also provides that leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit crimes against peace, crimes against humanity and war crimes are responsible for all acts performed by any persons in execution of such plan. Article 7 of the Nuremberg Charter denies the applicability of the "act of state" defense by making it clear that the official position of those who have committed such heinous crimes "shall not be considered as freeing them from responsibility or mitigating punishment." Finally, article 8 provides that the fact an individual acted pursuant to an order of his government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if justice so requires.

The principles of international law recognized by the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal itself were affirmed by a unanimous vote of the U.N. General Assembly in Resolution 95(I) on December 11, 1946. Since that time, the Nuremberg Principles have universally been considered to constitute an authoritative statement of the rules of customary international law dictating individual criminal responsibility for crimes against peace, crimes against humanity, and war crimes. Indeed in *Eichmann v. Attorney-General of the Government of Israel*,[9] the Supreme Court of Israel specifically held that the Nuremberg Principles "have formed part of the customary law of nations 'since time immemorial.' "

The Kahan Commission Report

Under the Nuremberg Principles, to the extent the U.S. Government has either permitted or not prevented Israel from using American weapons in explicit violation of international law and of U.S. domestic statutes applicable to arms transfer agreements,[10] it must assume full legal responsibility before the entire international com-

[9][1961] 36 I.L.R. 277, at 296 (1962).
[10]*See* N.Y. Times, April 1, 1983, at 1.

munity for all crimes against peace, crimes against humanity and war crimes committed or condoned by Israel and its allied Phalange and Haddad militia forces operating in Lebanon. Such responsibility would include the savage massacre of several hundred innocent Palestinian civilians by organized units of the Phalangist militia at the Sabra and Shatilla refugee camps located in West Beirut that were then subject to the control of the occupying Israeli army.

As the occupying power in West Beirut at the time, Israel was fully responsible for the barbarous treatment inflicted upon these Palestinian refugees by the Phalange militia, which it had specifically ordered into the camps. Article 29 of the Fourth Geneva Convention clearly provides that the party to the conflict (*i.e.*, Israel), in whose hands protected persons may be, is responsible for the treatment accorded to them by its "agents," irrespective of any individual responsibility which may be incurred. In regard to this latter point, despite the terminology utilized by the Kahan Commission Report, international law does not recognize the existence of the phenomenon therein denominated as "indirect responsibility" for war crimes and crimes against humanity. The test of individual responsibility for such heinous crimes that is recognized by customary international law is succinctly stated in section 501 of the U.S. Army Field Manual on *The Law of Land Warfare* (1956), which in turn is based upon the famous case of General Yamashita. According to this test, any Israeli Government official or military commander who "has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war, or to punish violators thereof," shall be responsible for such crimes.[11] Applying this test to the factual findings of the Kahan Commission Report, and taking the latter at face value, it is evident that Prime Minister Begin, former Defense Minister Sharon, Foreign Minister Shamir, former Chief of Staff Rafael Eytan, Director of Military Intelligence Saguy, and Generals Drori and Yaron, inter alia, must assume full personal responsibility under international law for all war crimes and crimes against humanity perpetrated by the Phalange militia units at Sabra and Shatilla. Furthermore, article 147 of the Fourth Geneva Convention defines such atrocities as constituting "grave breaches" that require the imposition of "effective penal sanctions" upon perpetrators in accordance with article 146.

U.S. Responsibility

Moreover, there are also serious indications of additional elements of legal responsibility for the September massacre on the part of the U.S. Government. The Reagan Administration played the lead role in securing the withdrawal of PLO troops from Beirut, in return for American and Israeli guarantees of protection for Palestinian civilians left behind, then prematurely evacuated U.S. marines from Lebanon. A report in *The Sunday Times* of London states that U.S. officials in Beirut learned of an ongoing massacre in these undefended refugee camps on the evening of Thursday, September 16, only a few hours after the Israeli Defense Force had permitted the Phalangists to enter them.[12] Yet U.S. officials failed to act upon this information so as not to compromise the source of their intelligence. Under these circumstances, the

[11]*See* U.S. ARMY FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, § 501, at 178-79 (1956). *Accord Application of Yamashita*, 327 U.S. 1 (1946).

[12]*See* Sunday Times (London), Jan. 30, 1983, at 1, col. 8.

burden of proof is upon the U.S. Government to refute any allegations of complicity in the massacre.

The need for a thorough investigation of U.S. responsibility for violations of the laws of humanitarian armed conflict by the Phalangists throughout Lebanon is rendered even more imperative by the reported fact that the C.I.A. has been providing military and financial assistance to the Phalange since at least March of 1981.[13] At the very minimum, the Phalange militia is bound to observe (common) article 3 of the four Geneva Conventions of 1949, which applies in the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties (*i.e.*, Lebanon). Other reported violations of (common) article 3 and the laws of humanitarian armed conflict committed by the Phalange in southern Lebanon and the Bekaa Valley include extortion, abductions, killings, rapes, and the intimidation and harassment of the civilian population, especially Palestinians. As the occupying power in southern Lebanon and the Bekaa Valley, the Israeli Government must assume full responsibility for failing to suppress such atrocities and punish their Phalange perpetrators. Under these horrendous circumstances, the U.S. Government has an absolute duty to employ the tremendous leverage over Israel afforded by its arms supply relationship and economic assistance in order to secure the strict obedience to the laws of war by Israel and its allied Phalange and Haddad militias, and to obtain Israel's immediate and unconditional withdrawal from Lebanon as required by U.N. Security Council Resolution 508 (1982) and Resolution 509 (1982), both of which are legally binding on Israel and the United States under Charter article 25.

The Arab Deterrent Force

The Begin Government is not entitled to invoke the lawful presence of the Arab Deterrent Force in Lebanon as a reason to justify the continuation of its undeniably lawless military occupation of that country. The Arab Deterrent Force, composed primarily of Syrian troops, had been stationed in Lebanon and has conducted its peacekeeping operation with the consent of the Lebanese Government and with the approval of the League of Arab States. The League is the appropriate regional arrangement under chapter 8 of the U.N. Charter for the purpose of sanctioning such international peacekeeping activities in a member state such as Lebanon. Admittedly, Syrian troops originally intervened in the Lebanese civil war in 1976 on the side of the Maronite Christian forces without the prior approval of the Lebanese Government. But in this matter Syria simply followed the international legal precedent already set by the U.S. Government during 1965 in order to legitimize on an ex post facto basis its arguably illegal military intervention into, and occupation of, the Dominican Republic. Thereafter, the Johnson Administration resorted to the Organization of American States (OAU) for its approval to transform American soldiers into an Inter-American Peacekeeping Force.[14] In a May 5, 1965 *Memorandum on the Legal Basis for United States Actions in the Dominican Republic*, distributed by the U.S. State Department, its Legal Adviser argued as follows: "The propriety of a regional agency 'dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action' is expressly recognized by Article 52 of the Charter of

[13]*See* Washington Post, Nov. 15, 1982, at B25.

[14]Resolution of the Tenth Meeting of Consultation of the Ministers of Foreign Affairs of the American Republics Establishing an Inter-American Force for the Dominican Republic, adopted May 6, 1965, DEPT. OF STATE BULL., May 31, 1965, at 862-63.

the United Nations."[15] Because of the legal position it formally adopted to justify its Dominican occupation, the U.S. Government is effectively estopped to deny that the League of Arab States could lawfully authorize the occupation of Lebanon by Syrian troops integrated into the Arab Deterrent Force (1) with the consent of the Lebanese Government, (2) subject to the overall supervisory jurisdiction of the League, and (3) for the limited purpose of terminating the civil war that then mercilessly raged throughout the country. As a matter of sound foreign policy, therefore, the U.S. Government must not treat the illegal presence of the Israeli army in southern Lebanon on the same footing as the lawful presence of the Arab Deterrent Force in eastern and northern Lebanon.

This conclusion, however, is not intended to obscure the fact that in the Syrian occupied zone of the Bekaa Valley, credible reports have emerged of instances where Syrian troops have engaged in acts of intimidation, harassment, physical mistreatment, arbitrary detention, kidnappings and extortion of protection money directed against the civilian population, all of which actions violate Syrian obligations as an Occupying Power under the Fourth Geneva Convention and the Hague Regulations. In addition, Syrian troops have failed to keep the peace in the territory they occupy in the Bekaa and in northern Lebanon so that paramilitary groups, including a variety of Moslem and Christian militias such as the Phalange, the Guardians of the Cedars and the Front for Liberating Lebanon from Foreigners, remain free to take advantage of the civilian population and to perpetrate similar crimes upon them. Finally, Syria has permitted Iranian "volunteer" troops to enter the territory it occupies in the Bekaa and must therefore assume full responsibility for their behavior.

The Role of the United Nations Interim Force in Lebanon (UNIFIL)

The Israeli Government has no right under international law to intervene in the domestic affairs of Lebanon by dictating the terms of its government or of a peace treaty as conditions for the withdrawal of its troops. The foreign and domestic future of the Lebanese Government must be determined by the Lebanese people without interference or compulsion from any external source. The most effective means to ensure the success of this endeavor is for Israel immediately to withdraw its troops from Lebanon and to turn over evacuated territory to UNIFIL. Israeli charges that UNIFIL cannot be trusted because the United Nations is biased against Israel obfuscate the fact that UNIFIL operates under the auspices of the Security Council (not the General Assembly), where the United States can, if appropriate, exercise a veto power. The evidentiary record clearly establishes that UNIFIL has proven to be quite effective at preventing the large-scale infiltration of PLO fighters across the Israeli-Lebanese border. A renewed and strengthened mandate for UNIFIL will enable it to continue to perform this task until the Lebanese army is reconstituted as an effective and independent military force under the control of a functioning and truly representative central government.

The precedent of the U.N. military force sent by the Security Council to the Congo from 1960 to 1964, known by its French acronym ONUC,[16] indicates that UNIFIL can be fortified with sufficient manpower, weapons and authorization to use force offensively, if necessary, in order to accomplish its mission of guaranteeing the territorial integrity and political independence of Lebanon. Such a strengthened mandate

[15]Department of State, Legal Basis for United States Actions in the Dominican Republic, May 17, 1965, 111 Cong. Rec. 11119 (1969).

[16]*See* G. ABI-SAAB, U.N. OPERATION IN THE CONGO 1960-1964 (1978).

for UNIFIL could permit the withdrawal of the Arab Deterrent Force by the League of Arab States at the request of a truly representative Lebanese Government, and the deployment of UNIFIL troops along the Lebanese-Syrian border in its place. UNIFIL would remain in Lebanon for as long as a truly representative government felt it was needed to ensure the restoration of internal peace and stability to that country and in its foreign relations with immediate neighbors.

Yet as part of a conscientious and coordinated effort to eviscerate UNIFIL further, the Reagan Administration has sought to subvert and flagrantly violate the terms of the U.S. War Powers Resolution of 1973. This statute mandates that the President must remove those American marines he introduced into Lebanon on September 29, 1982 within 60 days, unless Congress specifically authorizes their continued use. The U.S. Congress must adamantly insist upon the President respecting its constitutional and statutory prerogatives in this matter, and thus demand that all American military forces be immediately withdrawn from Lebanon and their positions occupied by UNIFIL troops. UNIFIL will prove far more effective at keeping the peace among the various factions in Lebanon and at protecting the lives of innocent Palestinian and Lebanese Moslem civilians from additional gross violations of their fundamental human rights by the Phalangists, the Haddad militia and other irregular paramilitary groups organized by the Israel Defense Forces (IDF) than American Marines ever could be.

The Gemayel Regime

In the meantime, the regime of Amin Gemayel currently exerts effective control over only certain limited sectors in the city of Beirut. Therein it is bound to observe, at a minimum, (common) article 3 of the four Geneva Conventions of 1949, which applies to the case of an armed conflict not of an international character. Nevertheless, there have been repeated and credible reports that authorities in the Gemayel regime and members of the Lebanese army subject to its authority have engaged in a widespread pattern of violations directed against the civilian population of Beirut. Of special concern is a fairly extensive policy of harassment, intimidation and discrimination practiced against Palestinian residents and refugees that seems purposefully calculated to drive the entire Palestinian people out of Lebanon. Similarly, in the aftermath of the Israeli occupation of West Beirut last summer, the Gemayel regime proceeded to disarm Moslem militia forces operating in the city. Yet it has completely failed to disarm the Phalanage and other Christian militias in Beirut, which have exploited this opportunity to perpetrate additional outrages on the civilian population of the city, and especially upon Palestinians. Given the circumstances surrounding the creation of the Gemayel regime amidst a cordon of Israeli troops, it can accurately be characterized under international law as a "puppet government" established by the United States and Israel for the express purpose of accomplishing their respective military and political objectives in Lebanon. Consequently, according to article 29 of the Fourth Geneva Convention, both Israel and the United States are fully responsible for all violations of the laws of humanitarian armed conflict inflicted upon the civilian population of Beirut, especially Palestinians, by their "agent" the Gemayel regime.

The Haddad Militia

The United States must actively oppose any proposals by the Israeli Government to establish some type of semipermanent international police force in Lebanon that is not under the jurisdiction of the U.N. Security Council, or worse yet, to create some form of "security zone" policed by Israeli or American troops in southern Lebanon. In this

regard, Israel is also obliged to dismantle the Lebanese Christian enclave it has illegally constructed along the border under the command of Major Haddad, whose followers have resisted the interposition of UNIFIL troops with the active collusion of the Israeli Government. The Haddad militia forces now claim control of a zone in southern Lebanon that extends from the Israeli border to the Awali bridge north of Sidon, and with the support of the IDF, refuse to permit the introduction of Lebanese army troops into this expanded zone. Within the territory it controls, however, the Haddad forces are bound to observe, at a minimum, (common) article 3 of the four Geneva Conventions of 1949, which applies in the case of an armed conflict not of an international character. Nevertheless, there have been credible reports that the Haddad militia forces have launched a campaign of violence, terror and intimidation directed against the local Palestinian population as part of a calculated effort to drive it out of Lebanon.

Article 29 of the Fourth Geneva Convention makes it clear that a party to the conflict such as Israel, in whose hands protected persons may be, is responsible for the treatment accorded to them by its "agents." Given the historical role the Israeli Government has played in the creation of the Haddad militia and its continuing provision of political, military and economic support, it is clear that the term "agent" includes the Haddad militia. Article 49 of the Fourth Geneva Convention absolutely prohibits individual or mass forcible transfer or deportations of protected persons from occupied territory to any other country for any reason whatsoever, and article 147 defines such offenses to be a "grave breach" of the Convention requiring the imposition of "effective penal sanctions" upon perpetrators in accordance with article 146. As the occupying power in southern Lebanon, the Israeli Government must assume full legal responsibility for all violations of the humanitarian laws of armed conflict committed by its "agent," the Haddad militia, which the IDF have either encouraged, permitted, or failed to suppress and punish.

A Role for the United Nations

If the United Nations has so far proven to be largely ineffective during the current stage of the Lebanese crisis, it is only because the United States has actively opposed the Security Council's adoption of any effective measures against Israel in order to ensure the latter's compliance with the most elementary rules of international law. At the initiative of the United States, the Security Council must now invoke its enforcement powers under chapter 7 of the U.N. Charter by determining that the Israeli invasion and occupation of Lebanon is a "breach of the peace" and an "act of aggression" under article 39 warranting the imposition of a universal embargo upon the sale or provision of arms, munitions and military supplies to Israel along the lines of the U.N.-mandated arms embargo against South Africa. If an arms embargo should prove insufficient to obtain Israeli withdrawal, Charter article 41 permits the Security Council to require all 156 other members of the United Nations to impose the sanctions of "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communications, and the severance of diplomatic relations" upon Israel. If the U.S. Government continues to veto Security Council resolutions designed to secure Israel's immediate and unconditional withdrawal from Lebanon, the U.N. General Assembly must act under the terms of its Uniting for Peace Resolution 377A(V)(1950) to recommend that all U.N. members impose such sanctions against Israel on their own accord. Since the U.S. Government originally proposed and sponsored the passage of the Uniting for Peace Resolution in the General Assembly for the express purpose of circumventing the abusive exercise of

the veto power by the Soviet Union in the Security Council during the Korean War, the Reagan Administration would be estopped to deny that such collective measures against Israel by the membership of the General Assembly were lawful.

International Terrorism

Because of the presence of almost 500,000 Palestinian refugees in Lebanon, a long-term solution to the problems of that country can only be found when Israel is willing to recognize the international legal right of the Palestinian people to self-determination. Despite the Camp David Accords, neither Egypt, Israel, the United States, Jordan, nor, for that matter, any other Arab state, has any right under international law to negotiate on behalf of the Palestinian people. Both the U.N. General Assembly and the League of Arab States have determined that the PLO is the legitimate representative of the Palestinian people. That determination must be respected by Israel and the United States for the purpose of negotiating an overall settlement on the ultimate disposition of the West Bank, the Gaza Strip and Jerusalem. Mutual and simultaneous recognition of their respective rights under international law by Israel and the PLO must be the next stage in the development of the Middle East peace process.

The Israeli Government has repeatedly stated that under no circumstances will it ever recognize the PLO as the legitimate representative of the Palestinian people because that group is said to be a "terrorist" organization. "Terrorism" is a vacuous and amorphous concept entirely devoid of an accepted international legal meaning, let alone an objective political referent. The standard cliché that one man's "terrorist" is another man's "freedom fighter" is not just a clever obfuscation of values. It indicates that the international community has yet to agree upon a legal or political definition for the term "terrorism." This pejorative and highly inflammatory term has been used by the Governments of Israel, the United States, Great Britain, and the Soviet Union, inter alia, to characterize acts of violence ranging the spectrum from common crimes to wars of national liberation legitimized by the appropriate international organizations. Invoking a holy war against "terrorism" may constitute effective governmental propaganda to manipulate public opinion in support of a foreign policy premised on considerations of Machiavellian power politics. It cannot serve as the basis for conducting a coherent and consistent foreign policy that protects and advances a state's legitimate national security interests in accordance with the requirements of international law.

The Palestinian National Charter of 1968 calls explicitly for the destruction of the state of Israel and its replacement by a secular Palestinian state on the territory of what was once the League of Nations Mandate for Palestine awarded to Great Britain after the First World War. Article 10 of the National Charter proclaims that commando action constitutes the nucleus of the Palestinian popular liberation war. On the other hand, one of those passages from the Bible that the Begin Government apparently relies upon to support its farfetched claim to sovereignty over the West Bank, because "Judea and Samaria" are said to be part of the "Promised Land" granted by God to the Hebrew people, contains the following injunction for dealing with the native inhabitants: "But of the cities of these people, which the Lord thy God doth give thee for an inheritance, thou shalt save alive nothing that breatheth. Thou shalt utterly destroy them; namely, the Hittites, and the Amorites, the Canaanites, and the

Perizzites, and Hivites, and the Jebusites; as the Lord thy God hath commanded thee."[17]

The Israeli Government's illegal invasion of Lebanon in order to destroy the PLO, its gross violations in Lebanon of the Geneva Conventions of 1949 and the humanitarian laws of armed conflict accepted by all civilized nations, its illegal annexations of Jerusalem and of the Golan Heights, and its repeated violations of the Fourth Geneva Convention and the customary international law of belligerent occupation in all of these occupied territories (*e.g.*, construction of Jewish settlements, deportation of inhabitants, collective punishments, the "Milson Reforms") tend to indicate that Prime Minister Begin, a devoutly religious man, is taking God's command at face value. Under his lawless and misguided leadership, Israel has gradually become a pariah state within the international community, a disgraceful position it now shamelessly shares with the apartheid regime of South Africa, one of its few remaining allies besides the United States. The time has long passed for the Reagan Administration to pull America out of its "unholy alliance" with Israel and the Christian Phalangists in Lebanon.

Revision of Resolution 242 (1967)

The only way out of this conundrum of "terrorism" in the Middle East is for Israel and the PLO to accord each other mutual and simultaneous recognition of their respective rights under international law, thus decisively breaking the cycle of violence, retaliation and counter-retaliation that has developed between them. The U.S. Government can facilitate this objective by sponsoring an amendment to U.N. Security Council Resolution 242 (1967) that would explicitly affirm the international legal right of the Palestinian people to self-determination. On the other hand, in regard to ensuring Israel's existence, a revised Resolution 242 would continue to affirm the necessity for "[t]ermination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every state in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force" and could be amended to protect the state of Israel specifically by name. Such a revised Resolution 242 could then be accepted by Israel and the PLO as a prelude to negotiations over the ultimate disposition of the West Bank, the Gaza Strip and Jerusalem. With these negotiations underway, there would be no need for the PLO to launch any military operations against Israel from Lebanon, Jordan, the occupied territories, or abroad, and no reason for Israel to continue its war against the PLO and the Palestinian people.

The PLO is neither a "state" nor a "government" within the contemplation of international law, but only the legitimate representative of the Palestinian people for the purpose of negotiating procedures leading to implementation of their international legal right of self-determination. Thereafter the future status of the PLO must be determined by the Palestinian people themselves. In the meantime, however, the U.N. Charter, the international laws of humanitarian armed conflict, and general principles of customary international law absolutely prohibit both Israel and the PLO from using force in an effort to exterminate each other and, in the process, the people of Lebanon. Unfortunately, under the influence of Alexander Haig, the Reagan Administration has acquiesced in Israel's illegal attempt to destroy the PLO in Lebanon by means of American weapons, munitions, supplies and money. The great tragedy of

[17]Deuteronomy 20:16-17 (King James). To the same effect are Exodus 23:23-33, 34:10-24; Numbers 33:50-56; and Joshua 10:28-43, 24:8-13.

the current stage in the Middle East crisis is that the Reagan Administration has either approved, or else not adamantly opposed, Israel's flagrant and repeated violations of international law and of U.S. domestic statutes applicable to arms transfer agreements. The creation of peace in the Middle East demands vigorous American leadership acting in strict accordance with the rules of international law and in full cooperation with the relevant international institutions.

The Reagan Peace Plan

In his Senate confirmation hearings, George Shultz indicated that he was thinking along these lines. He should have seized the opportunity presented by a transition in power to repudiate completely the misconceived policies of his Machiavellian predecessor. The so-called Reagan Peace Plan announced September 1, 1982, that was drafted under Shultz' influence, represents a welcome departure from Haig's tragically flawed "strategic consensus" approach to America's Middle East foreign policy decisionmaking. At least the Reagan Peace Plan recognizes that the dispute between Israel, on the one hand, and its neighbor states and the Palestinian people, on the other, must be resolved on its own merits. Yet from the perspective of international law, the Reagan Peace Plan is severely deficient for a number of basic reasons.

First and foremost is that the U.S. Government has no legal right or standing to exclude unilaterally and in advance of any negotiations the creation of an independent sovereign state on the West Bank and Gaza Strip from among the various options open to the Palestinian people when they finally have the opportunity to exercise their international legal right of self-determination. The self-determination of peoples has been a fundamental principle of American foreign policy and of international law and politics since President Woodrow Wilson's famous Fourteen Points Address of January 8, 1918 to a joint session of Congress setting forth the war aims and peace terms acceptable to the U.S. Government for the termination of the First World War, the last one of which laid the cornerstone for the foundation of the League of Nations.[18] In that speech Wilson emphatically called for an end to Machiavellian power politics and all its essential accouterments for the postwar world: the balance of power, secret diplomacy, trade barriers, armament races, and the denial of national self-determination. This interconnected and inseparable set of principles for the conduct of international relations had eventuated in such cataclysmic consequences that they had to be replaced completely by an essentially different system based upon antithetical operational dynamics: international organizations and law, collective security, open diplomacy, free trade, freedom of the seas, arms reduction, disarmament, and the self-determination of peoples. A new era of world history was to dawn with the League of Nations, and the old world of Machiavellian power politics was to be left behind as an evolutionary stage of barbarism in the human condition to which mankind must never return.

The Right of the Palestinian People to Self-determination

The fundamentality of the interdependence between universal peace among nations and the principle of equal rights and self-determination of peoples is explicitly recognized and affirmed in article 1(2) of the U.N. Charter, the successor to the Covenant of the League. That principle was the motivating force behind the General Assembly's adoption of Resolution 181(II) of November 29, 1947, that called for the creation of independent Arab and Jewish states (joined in an Economic Union) and an interna-

[18]PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES 464-72 (A. Shaw ed. 1918).

tional trusteeship for the City of Jerusalem after the termination of the League of Nations Mandate for Palestine. That promise for the creation of a Jewish state in the mandated territory has been fulfilled, whereas that decision in favor of the creation of an independent Arab state remains to be carried out. The international legal right of the Jewish people to found the sovereign state of Israel stands on the same legal footing as the international legal right of the Palestinian people to found a state of their own on the West Bank and Gaza Strip.

The Begin Government's pursuit of a policy tantamount to genocide against the Palestinian people in Lebanon demonstrates precisely why they require an independent state of their own in order better to protect their physical existence and preserve their cultural heritage. In the aftermath of the Second World War, similar sentiments had motivated the international community to support the creation of Israel for the protection of the Jewish people against a repetition of the Nazi holocaust. There will be no peace in the Middle East until the Palestinian people are likewise given the opportunity to exercise their international legal right of self-determination in whatever manner they choose, not in accordance with a limited set of alternatives preselected for them by the United States in collusion with Israel, Egypt or Jordan. When the Reagan Administration unilaterally forecloses the option of an independent sovereign state to the Palestinian people, it betrays the fact that the keystone of its foreign policy towards the Middle East remains considerations of Machiavellian power politics that are not entitled to the respect of other nations or the support of the American people.

The Dangers of Machiavellianism

This conclusion is corroborated by the fact that the progenitor of the Reagan Peace Plan was none other than Henry Kissinger himself, today's leading proponent of practicing Machiavellian power politics in international relations.[19] Since his departure from governmental office, Kissinger's self-interested posturing on subjects of such monumental importance to world peace as SALT II and the Iranian hostages crisis, inter alia, has been so highly opportunistic and unprincipled that the American people should never again listen to his pseudo-Machiavellian advice on the proper conduct of U.S. foreign policy. Unfortunately Shultz, like Haig before him, seems willing to give Kissinger's ideas another chance. Yet the world might not survive another Kissingerian "nuclear alert" of U.S. forces during some future Middle East war, as occurred in 1973.

In a nuclear world the present danger is Machiavellian power politics. The only antidote is international law and organizations. The existential choice is that stark, ominous and compelling in the Middle East.

Comments by W. Michael Reisman*

Like Professor Rostow, I admire very much the initiative, courage and commitment to principles of international law evidenced by the people who conducted these field investigations and who have composed the Report that is the subject of our discussion. My admiration and affection for Dick Falk knows no bounds. However, I do have many reservations about the legal notions and appraisals in the MacBride Report, even though I start out with a set of political preferences with regard to a Middle Eastern solution that I think are quite close to those animating some drafters of the Report.

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[19] *See* The New Republic, Oct. 4, 1982, at 13.